

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID LEE ELLIS,

Defendant-Appellee.

UNPUBLISHED

May 17, 2012

No. 299772

Ingham Circuit Court

LC No. 10-00096-FH

Before: OWENS, P.J., and TALBOT and METER, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions following a jury trial of two counts of breaking and entering with intent to commit larceny, MCL 750.110, and one count of possession of burglar's tools, MCL 750.116. We affirm.

This case arises out of two break-ins that occurred on January 3, 2010. One occurred at Total Electric Motor Sales, LLC. The other occurred next door at Michelle's Studio of Dance and Performing Arts Center. Mark Iansiti, owner of Total Electric Motor Sales, testified that he discovered his store had been broken into on the morning on January 4, 2010. The doorknob and deadbolt on the store's front door were damaged. The frame on the storage room door was also bent and wrenched out and several items were missing, including an air compressor, tools, and cash. Michelle McDevitt, owner of the dance studio, found her door and door knob broken and that two stereos were missing.

Before trial, the prosecutor submitted a notice of intent to use MRE 404(b) evidence "for any of the purposes enumerated by the Rule." Defendant did not object and during trial the prosecution called defendant's cousin, Jennifer Salli. Salli testified that on September 16, 2009, defendant came over to her house and they had a conversation about taking him to a Meridian Township car wash so that he could break into the business. Salli testified that she dropped him off after midnight, about a quarter mile from a car wash.

Defendant argues that he was denied effective assistance of counsel because his trial counsel failed to object to the admission of Salli's other acts testimony. A defendant's right to counsel is guaranteed by the United States and Michigan Constitutions. US Const, Am VI; Const 1963 art 1, § 20. This right to counsel encompasses the effective assistance of counsel. *People v Cline*, 276 Mich App 634, 637; 741 NW2d 563 (2007). To establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was below an

objective standard of reasonableness under prevailing professional norms; and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Strickland v Washington*, 466 US 668, 687-688; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

First, defendant contends that the prosecutor's notice of intent did not state the specific purpose for which the other acts evidence would be used, and that defense counsel was ineffective for failing to object to this defect. Generally, a prosecutor must provide reasonable notice of his intent to present bad acts evidence:

The prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial and the rationale . . . for admitting the evidence. [MRE 404(b)(2).]

The notice of intent provided in pertinent part as follows:

PLEASE TAKE NOTICE that at a trial of this matter, the people may seek to introduce evidence under Michigan Rule of Evidence 404 B. This evidence may be used for any of the purposes enumerated by the Rule.

1) Evidence obtained in the investigation of the incidents that lead to the charges now encompassed by Docket number 10-0362-FH presently pending in this court.

The case referenced was the break-in of the Okemos car wash.¹

MRE 404(b)(1) provides that evidence of other crimes may be admissible to show "proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case." By referencing MRE 404(b)(1), defendant was on notice that plaintiff would be seeking to introduce other acts evidence.

[T]he essential value and underlying aims of MRE 404(b)(2) are (1) to force the prosecutor to identify and seek admission only of prior bad acts evidence that passes the relevancy threshold, (2) to ensure that the defendant has an opportunity to object to and defend against this sort of evidence, and (3) to facilitate a thoughtful ruling by the trial court that either admits or excludes this evidence and is grounded in an adequate record. [*People v Hawkins*, 245 Mich App 439, 454; 628 NW2d 105 (2001).]

¹ The notice also referenced charges pending in another case involving a break-in of a restaurant.

Plaintiff's notice gave "defendant . . . an opportunity to object." *Id.* Such an objection could have then compelled plaintiff to specify the purpose and explain the relevance of the evidence, which would afford "the trial court and the defense an opportunity to test the genuine value of the evidence." *Id.* Because defense counsel failed to object to the notice of intent, defendant missed an opportunity to have this evidence reviewed by the trial court. This failure to object to the prior acts evidence was not objectively reasonable given the tenuous relationship between the prior act and the charged acts.

Defendant also argues that trial counsel's performance was deficient because he failed to object to Salli's trial testimony. Defendant argues that Salli's testimony was inadmissible because the break-in at the car wash was not sufficiently similar to the charged break-ins so as to establish the identity of the perpetrator. See *People v Sabin (After Remand)*, 463 Mich 43, 65; 614 NW2d 888 (2000). However, the prior acts evidence in this case was not submitted to prove identity. The trial court instructed the jury that it could "only think about whether [Salli's testimony] tended to show that the Defendant used a plan, system or characteristic scheme that he has used before or since."

In *Sabin*, our Supreme Court explained that the degree of similarity necessary to show a common plan or scheme by a defendant is less than that needed to prove identity. *Id.* at 66. "To establish the existence of a common design or plan, the common features must indicate the existence of a plan rather than a series of similar spontaneous acts, but the plan thus revealed need not be distinctive or unusual." *Id.* at 65-66. A "[g]eneral similarity between the charged and uncharged acts does not, however, by itself, establish a plan, scheme, or system used to commit the acts." *Id.* at 64. "The added element, then, must be, not merely a similarity in the results, but *such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations.*" *Id.* at 64-65 quoting 2 Wigmore, Evidence (Chadbourn rev), § 304, p 249 (emphasis in original).

Here, evidence of the car wash break-in was not sufficiently similar to the two break-ins for which defendant was convicted. The prosecutor noted that all crimes occurred at night and in Meridian Township, and they each involved breaking into businesses that were closed. This evidence, however, shows only a "general similarity," not "*a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations.*" *Id.* Therefore, evidence of the car wash break-in should not have been admitted under MRE 404(b). By failing to object to the admission of the evidence, defense counsel's performance fell below an objective standard of reasonableness. *Strickland*, 466 US at 687-688.

However, even though defense counsel's performance was objectively unreasonable, defendant is unable to establish that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. As the prosecutor correctly notes, there was overwhelming evidence of defendant's guilt. An air compressor that defendant sold to a pawn shop was positively identified as belonging to Iansiti. Further, during a search of defendant's home, police found a tool box that was later identified as belonging to Iansiti. Police also found two RCA stereo systems, which McDevitt recognized as the stereos taken from her dance studio. Police also found a screwdriver at defendant's home, which matched the tool marks left on Iansiti's storage door. A firearms and tool marks examiner with the Michigan

State Police Forensic Science Laboratory testified that it was a practical impossibility that any other tool could have produced the tool marks. Additionally, defendant's shoes were found to have the same tread design, size of tread design, and wear characteristics as the footwear impressions taken from outside the businesses. Police also found two yellow-painted crowbars at defendant's home, which was consistent with the yellow paint chips discovered on the door frames at the two businesses. Further, the crowbars had red and green paint chips on them which was consistent with McDevitt's testimony that the front door of her studio was originally green, but she painted it red when she moved into the building.

Given the combined weight of the evidence properly admitted, no reasonable probability exists that, but for counsel's error, the result of the proceedings would have been different. *Strickland*, 466 US at 687-688.

Affirmed.

/s/ Donald S. Owens

/s/ Michael J. Talbot

/s/ Patrick M. Meter